

# **2020 ADVANCED DUI TRIAL ADVOCACY**

August 31 – September 3, 2020  
Phoenix, Arizona



**Thursday, September 3, 2020**

## **Marijuana DUI Cases**

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# Medical Marijuana



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## What Did Dobson Say?

▶ "A qualifying patient may be convicted of an (A)(3) violation if the state proves beyond a reasonable doubt that the patient, while driving or in control of a vehicle, had marijuana or its impairing metabolite in the patient's body. The patient may establish an affirmative defense to such a charge by showing that his or her use was authorized by the AMMA - which is subject to the rebuttable presumption under § 36-2811(A)(2) - and that the marijuana or its metabolite was in a concentration insufficient to cause impairment. The patient bears the burden of proof on the latter point by a preponderance of the evidence..."

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## What Did Dobson Say ?

### DEFENDANT PROVES

1. Using Pursuant to AMMA
2. Concentration of MJ in blood was an insufficient amount to cause impairment

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## Presumption A.R.S. 36-2811

A. There is a presumption that a qualifying patient or designated caregiver is engaged in the medical use of marijuana pursuant to this chapter.

1. The presumption exists if the qualifying patient or designated caregiver:

(a) Is in possession of a registry identification card.

(b) Is in possession of an amount of marijuana that does not exceed the allowable amount of marijuana.

▣ Patient- 2.5 oz

2. The presumption may be rebutted by evidence that conduct related to marijuana was not for the purpose of treating or alleviating the qualifying patient's debilitating medical condition or symptoms associated with the qualifying patient's debilitating medical condition pursuant to this chapter.

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▣ Possession of a registry card creates a presumption that a qualifying patient is engaged in the use of marijuana pursuant to the AMMA, so long as the patient does not possess more than the permitted quantity of marijuana.

▣ This is a Rebuttable Presumption.

▣ In most DUI cases, are you going to have rebuttal evidence on this point?

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## What Does *Ishak Say*?

▣ "The cardholder may satisfy that burden by, inter alia, cross-examining the arresting officer and the State's expert forensic scientist and/ or by offering any admissible evidence (including his or her own testimony) relevant to proving whether he or she was impaired at the time of the stop. That evidence may or may not include, as here, expert testimony that the cardholder's THC concentration is not always sufficient to cause impairment." ¶ 20

▣ Bottom Line: ANYTHING GOES

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## DARRAH V. MCLENNAN

- ▶ DID DEFENDANT PRESENT EVIDENCE OF CONCENTRATION INSUFFICIENT TO CAUSE IMPAIRMENT?
- ▶ DEFENDANT'S TESTIMONY "I hadn't used since the night before. And I didn't feel like I was under the influence at that time when he pulled me over"
- ▶ CRIMINALIST TESTIMONY: "the concentration level at which Darrah tested was below the range at which impairment is likely and was instead in the range at which impairment could possibly result"
- ▶ COURT: "He would have been entitled to argue to the jury that his marijuana use was authorized by the AMMA and that the concentration found in his body was insufficient to impair his driving."

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## Other Interesting Cases

- ▶ State v. Kimmish 244 Ariz. 314 (2018): California Physician Recommendation Letter is Sufficient for Protection under AMMA
- ▶ State v. Jones 2018 WL 3121440: AMMA does not Protect Hashish (Resin v. Plant/Mixture) - this is probably going to get overturned REAL fast
  - ▶ Told you... State v. Jones, 246 Ariz. 452 (2019) vacated the Court of Appeals decision. Marijuana as defined in AMMA includes ALL parts of the plant... even resin 36-2801(8).... Did not look to definitions under 13-3401
- ▶ State v. Robbins 2016 WL 4894863 : AMMA DOES NOT APPLY TO A1

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## WHAT DOES IT ALL MEAN??

- ▶ AMMA does NOT immunize defendants from A(3)
- ▶ State does NOT have to prove impairment on A(3)
- ▶ State does NOT have to prove marijuana concentration

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## WHAT DOES IT ALL MEAN??

- ▶ Our Case in Chief does not change
- ▶ Defendant has the burden
- ▶ Only available to Medical Marijuana Program participants
- ▶ Only applies to A(3)

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## Where are we going?

- ▶ "To the contrary, unless and until some law establishes a non-rebuttable level of THC at which a driver is presumed to be impaired, the affirmative defense available to a qualifying AMMA cardholder..."

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## OR....

**OFFICIAL TITLE**

AN INITIATIVE MEASURE

AMENDING TITLE 36, CHAPTER 28.1, SECTION 36-2817, ARIZONA REVISED STATUTES; AMENDING TITLE 36, ARIZONA REVISED STATUTES, BY ADDING CHAPTER 28.2; AMENDING TITLE 42, CHAPTER 3, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 10; AMENDING TITLE 43, CHAPTER 1, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTION 43-108; RELATING TO THE RESPONSIBLE ADULT USE, REGULATION, AND TAXATION OF MARIJUANA.

TEXT OF PROPOSED AMENDMENT

Be it enacted by the People of the State of Arizona:

**Section 1.** Short title.  
This Act may be cited as the "Smart and Safe Arizona Act."

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36-2851 Employers, driving, minors, control of property, smoking in public places and open spaces  
THIS CHAPTER:

1. DOES NOT RESTRICT THE RIGHTS OF EMPLOYERS TO MAINTAIN A DRUG-AND-ALCOHOL-FREE WORKPLACE OR AFFECT THE ABILITY OF EMPLOYERS TO HAVE WORKPLACE POLICIES RESTRICTING THE USE OF MARIJUANA BY EMPLOYEES OR PROSPECTIVE EMPLOYEES.
2. DOES NOT REQUIRE AN EMPLOYER TO PERMIT OR ACCOMMODATE THE USE, CONSUMPTION, POSSESSION, TRANSFER, DISPLAY, TRANSPORTATION, SALE OR CULTIVATION OF MARIJUANA IN A PLACE OF EMPLOYMENT.
3. DOES NOT ALLOW DRIVING, FLYING OR BOATING WHILE IMPAIRED TO EVEN THE SLIGHTEST DEGREE BY MARIJUANA OR PREVENT THE STATE FROM ENACTING AND IMPOSING PENALTIES FOR DRIVING, FLYING OR BOATING WHILE IMPAIRED TO EVEN THE SLIGHTEST DEGREE BY MARIJUANA.
4. DOES NOT ALLOW AN INDIVIDUAL WHO IS UNDER TWENTY-ONE YEARS OF AGE TO PURCHASE, POSSESS, TRANSPORT OR CONSUME MARIJUANA OR MARIJUANA PRODUCTS.

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## PRETRIAL STRATEGY

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## Hold Them to Their Burden

- Must be alleged 20 days before trial
- We are entitled to discovery
- Not an element of the offense
- Defendant's burden to raise & prove

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- ▶ Use Motions in Limine
- ▶ Prepare Jury Instructions for the Court
- ▶ **Jury Selection is Crucial**

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What's THEIR Standard of Proof?

- ▶ "concentration insufficient to cause impairment"
- ▶ Use pursuant to AMMA

Preponderance of the evidence

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"The patient may establish an affirmative defense to such a charge by showing that his or her use was authorized by the AMMA - which is subject to the rebuttable presumption under § 36-2811(2) - and that the marijuana or its metabolite was in a concentration insufficient to cause impairment. The patient bears the burden of proof on the latter point by a preponderance of the evidence, as with other affirmative defenses."

See Dobson ¶ 20

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Who Decides?

- ▶ "concentration insufficient to cause impairment"
- ▶ Use pursuant to AMMA

Jury

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## Rebut the Presumption?



A FRIEND WITH WEED IS A FRIEND INDEED

Illegal sharing/illegal source



More than 2.5 oz. limit



Admissions of non-medical use

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## But you may also get this...



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### 36.28.11d – Arizona Medical Marijuana Act – DUI Affirmative Defense

It is a defense to the crime of [CRIME] that the defendant was authorized to use marijuana under the terms of the Arizona Medical Marijuana Act. Arizona law authorizes persons with debilitating medical conditions to use marijuana as medicine, so long as such persons are registered qualifying patients with the Arizona Department of Health Services.

The defendant may establish the affirmative defense by showing by a preponderance of the evidence that:

1. [he] [she] was a registered qualifying patient and possessed a valid registry identification card from the Arizona Department of Health Services permitting [him][her] to use marijuana for medical use at the time of [him][her] arrest; and
2. The concentration of the marijuana or its metabolites capable of causing impairment was insufficient to impair [him][her] at the time of driving.

**SOURCE:** A.R.S. §§ 36-2801, 36-2802, 36-2811; *State v. Fields (Chase)*, 232 Ariz. 265, 304 P.3d 1088 (App. 2013); *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 347, 322 P.3d 160, 164 (2014); *Dobson v. McClannan*, 238 Ariz. 389, 393 ¶ 20, 361 P.3d 374, 378 (2015); *Lisak v. McClannan*, 241 Ariz. 364, 367 ¶ 14-15, 388 P.3d 1, 4 (App. 2016).

**USE NOTE:** Defendants may plead the immunities in the Arizona Medical Marijuana Act in prosecutions under A.R.S. § 28-1381(A)(3), but not in prosecutions under A.R.S. § 28-1381(A)(1).

Registered Qualifying Patient standards are set forth in A.R.S. § 36-2804.04.  
Registry Identification Card validity standards are set forth in A.R.S. § 36-2804.04.  
“Qualifying Patient” is defined in A.R.S. § 36-2801(13).

**COMMENT:** In *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 347, 322 P.3d 160, 164 (2014).

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## RAJI

- ▣ The defendant may establish the affirmative defense by showing by a preponderance of the evidence that:
  - ▣ 1) he/she was a **registered qualifying patient and possessed a valid card** from the Arizona Department of Health Services permitting him/her to use marijuana for medical use at the time of his/her arrest
  - ▣ 2) that the concentration of marijuana or its impairing metabolite was **insufficient to impair him/her at time of driving**

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## Resist Attempts to Edit the Statute (Especially in Jury Instructions)

- ▣ The subtle:
  - ▣ Removing the word "solely."
  - ▣ Changing "to cause impairment" to "to impair defendant."
- ▣ And the not-so-subtle:
  - ▣ Shifting the burden to the state,
    - ▣ WE GET TO SAY "BURDEN SHIFTING!"
  - ▣ Suggesting there's an A(3) immunity.
  - ▣ Applying the affirmative defense to A(1).



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## SO WHAT'S YOUR TRIAL GOING TO LOOK LIKE ?

### Strategy

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## Strategies to Consider

- ▣ If you have strong impairment, dismiss (A)(3)
  - ▣ Keep "medical marijuana" out of the trial entirely
- ▣ If not, dismiss (A)(1)
  - ▣ Put the emphasis on their burden to prove insufficiency
- ▣ Go on both charges
- ▣ Look for ways to rebut medical use
  - ▣ Priors, admissions, possession of more than allowed amount
- ▣ ...

It's a DUI case emphasize impairment!

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## STATE V. CLARK, No. 2 CA-CR 2019-0048

- ▣ FACTS:
  - ▣ Stopped Because Headlight Out
  - ▣ Travelled Quarter of Mile Before Stopping
  - ▣ Defendant's license was suspended and Minor in Car
  - ▣ Bloodshot/Watery Eyes; Groggy Speech; Lethargic; Slow Demeanor
  - ▣ Defendant Admitted to Smoking MJ Earlier in the Day
  - ▣ Participated in FSTS "NUMEROUS SIGNS OF IMPAIRMENT"
  - ▣ THC 3.6 nanograms
  - ▣ State's Expert: can have impairment as low as 1 ng
  - ▣ Defense Expert: 3.6 is low but cant say one way or the other whether its impairing

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## STATE V. CLARK

- ▣ CHARGES:
  - ▣ 28-1381(A)(1) and 28-1383(A)(1)
  - ▣ 28-1381(A)(3) and 28-1383(A)(1)
  - ▣ 28-1381(A)(1) and 28-1383(A)(3)
  - ▣ 28-1381(A)(3) and 28-1383(A)(3)
- ▣ VERDICT:
  - ▣ Guilty on A3 Charges
  - ▣ Not Guilty on A1 Charges
- ▣ APPEAL:
  - ▣ Inconsistent Verdicts: if Jury found him not guilty on impairment charge then they should have found him not guilty on the A3 as well since there was no impairment proven

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## HOLDING

- ▣ ITS NOT THE STATE'S BURDEN TO PROVE HE WAS IMPAIRED ON THE A3 CHARGES!!!
- ▣ Jury Can Find Defendant NOT Guilty on A1 Because State Did Not Prove Impairment
- ▣ Jury Can At the Same Time Find Defendant GUILTY on A3 Because he Did Not Prove that the Amount of Marijuana was Insufficient to Cause Impairment
- ▣ These are NOT Inconsistent Verdicts

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## The Best Defense is a Good Offense

You get the first shot with your case-in-chief, so make it hurt!

- ▣ Don't skimp on impairment evidence.
- ▣ Use your expert(s)!

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## The Totality of the Circumstances

We're supposed to believe it's a coincidence?

- |                                    |                                   |
|------------------------------------|-----------------------------------|
| ▣ Slow, overly-cautious driving    | ▣ Relaxed inhibitions             |
| ▣ Poor reactions to the unexpected | ▣ Increased appetite              |
| ▣ Slow internal clock              | ▣ Debris in mouth                 |
| ▣ Poor coordination and balance    | ▣ Possible paranoia               |
| ▣ Divided attention impairment     | ▣ Impaired perception of distance |
| ▣ Odor of marijuana                | ▣ Eyelid tremors                  |
| ▣ Reddening of conjunctiva         | ▣ Admissions                      |
| ▣ Body Tremors                     | ▣ Paraphernalia in car            |
| ▣ Disorientation                   | ▣ Lack of Convergence             |
|                                    | ▣ Saying "Dude??"                 |

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## Explain How Observations Show Impairment

- ☐ Some obviously relate directly to driving
  - ▢ Impaired perception of time & distance
  - ▢ Disorientation
  - ▢ Impaired attention
  - ▢ Dilated pupils
- ☐ But others demonstrate the drug is actively affecting the person
  - ▢ Body/eyelid tremors
  - ▢ Increased blood pressure, pulse
  - ▢ Lack of convergence

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## Do not Expect Marijuana Impairment to Look Like Alcohol Impairment

Know the symptoms & educate the jury regarding what marijuana impairment looks like

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## Know What Not to Expect.

DRUG CATEGORY	CNS Depressants	CNS Stimulants	Hallucinogens	DAs	Narcotic Analgesics	Inhalants	Cannabis
HGN	Present	None	None	Present	None	Present	None
VGN	Present	None	None	Present	None	Present	None
Lack of Convergence	Present	None	None	Present	None	Present	Present
Pupil Size	Normal	Dilated	Dilated	Normal	Constricted	Normal	Dilated
Reaction to Light	Slow	Slow	Normal	Normal	Little to None	Slow	Normal
Pulse	Down	Up	Up	Up	Down	Up	Up
Blood Pressure	Down	Up	Up	Down	Up/Down	Up	Up
Temperature	Normal	Up	Up	Up	Down	Up/Down/N	Normal

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## Your First Expert:



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## Your Second Expert:



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## Educate Your Jury

(if you don't – the defense will)

- ▶ % of weekend nighttime drivers testing positive for THC increased almost 50% from 2007 to 2013-14. 2013-2014 NHTSA Roadside Survey.
- ▶ Marijuana use by drivers = significantly increased risk of automobile crash. *Marijuana Use & Motor Vehicle Crashes*. Li, Brady, et al.
- ▶ Recent users of Cannabis 3 – 7 times more likely to be responsible for crash. *Dose related risk of motor vehicle crashes after cannabis use*. Ramaekers, et al 2003.
- ▶ Fatal car crashes involving marijuana use tripled in one decade. *Trends in Alcohol and other Drugs Detected in Fatally Injured Drivers in the United States*. Li and Brady.



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## Prepare Them to Be Skeptical of the Defense

- ▣ "If the State's nice expert says there is no concentration for impairment, how is the Defendant going to prove his was too low?"
- ▣ "Wow, studies have shown impairment as low as 1 ng/ml?"
- ▣ "He had Hydroxy-THC so he used recently."
- ▣ "If Marijuana levels go down rapidly, the test result could be much lower than when he was driving!"

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## Use Stereotypes



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By the time you rest, it should be very hard to establish this affirmative defense.



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## What is the Affirmative Defense?

- ▶ "such [registered qualifying] patients cannot be deemed under the influence – and thus cannot be convicted under (A)(3) – based solely on concentrations of marijuana or its metabolite insufficient to cause impairment."

See Dobson ¶ 19

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## What is the Affirmative Defense?

- ▶ "such [registered qualifying] patients cannot be deemed under the influence – and thus cannot be convicted under (A)(3) – based **SOLELY** on concentrations of marijuana or its metabolite **INSUFFICIENT** to cause impairment."

See Dobson ¶ 19

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- ▶ This is a very limited defense
- ▶ It should not affect cases with observed impairment
- ▶ It does not require us to prove impairment on A(3)
- ▶ It does not require us to prove sufficiency to impair

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## So what will your Defendant try to do?

- ▢ Argue that the concentration *could* be insufficient.
- ▢ Reword the affirmative defense.
- ▢ Argue that he/she was not impaired.



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## Don't Let the AMMA Take Over!

- ▢ The "Medical Marijuana Program" should be a very small part of your trial.
- ▢ Participation is NOT the defense!

Although evidence of possession of a registry card would generally be admissible in an (A)(3) prosecution to invoke the presumption that the patient was using marijuana pursuant to the AMMA, it does not suffice to establish the [§ 36-2802\(b\)](#) affirmative defense.

Dobson ¶ 22

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## There is no .08 for THC

- ▢ Dobson ¶ 21 – Supreme Court acknowledges current science "no commonly accepted threshold for identifying such [impairing] concentrations."
- ▢ Everyone is different - studies show impairment at very low blood concentrations.
- ▢ Not aware of any study that establishes an amount "insufficient to cause impairment"



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## Establishing the Affirmative Defense

#1: The Card

#2: The Concentration

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## Defense: Bringing in the Card

▶ Through the defendant:

- ▶ Expect this when your defendant looks sympathetic or has a sympathetic backstory
- ▶ Expect a lot of irrelevant testimony in this scenario
- ▶ Don't let it hijack your trial!

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## Defense: Bringing in the Card

▶ Through a DHS Custodian of Records

- ▶ Expect this when your defendant has Rule 609 criminal history
- ▶ The goal is to get the presumption while shielding the defendant from cross-examination
- ▶ If they do this, they still need to prove "insufficient amount to cause impairment"

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## Defense: Insufficiency of Concentration

- ▶ THC in system is the harmless leftover of previous medicinal use.
- ▶ Concentration is really small (compared to...what?)
- ▶ Explain away any impairment you've presented



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## Tips for Defense Experts

- ▶ Chester will say "could be" to, apparently, just about any number.
  - ▶ Expect similar testimony from the rest of them
- ▶ Call out limited expertise.
  - ▶ Have they ever tested blood for drugs?
  - ▶ Where are they getting these opinions?
- ▶ Confront them with any impairment the defense skimmed over.
  - ▶ Or don't, and hammer it in closing
- ▶ Emphasize that there is no known level!
  - ▶ We don't have to prove one, so this only hurts the defense



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## Can they prove this without an expert?

- ▶ Defense is whether there is an insufficient **concentration** to cause impairment.
- ▶ This is a question of science – is the concentration found in defendant's body inadequate (or not enough) to cause impairment?
- ▶ Question is not did this concentration actually impair the defendant? [That is (A)(1)].

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## Can they prove this without an expert?

- ▶ (A)(3) is about the drug, not the person.
- ▶ It is Defendant's burden to show the concentration itself is insufficient to cause impairment.
- ▶ Analogize to Alcohol *per se* charges?

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## Rebuttal

- ▶ Evidence of active marijuana? (Hydroxy, signs or symptoms?).
- ▶ If affecting defendant – it was not insufficient to cause impairment.
- ▶ Why are you taking it? Because it has an effect.
- ▶ Rebutting fairness argument – not fair to punish sick person using their medicine.
- ▶ Unlike prescription medicine, medical marijuana does not have known drug concentrations or dosing information, so to protect the motoring public the law requires defendant to prove the concentration in his/her body could not have been impairing.

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## Conclusion: Same Drug, Same Crime



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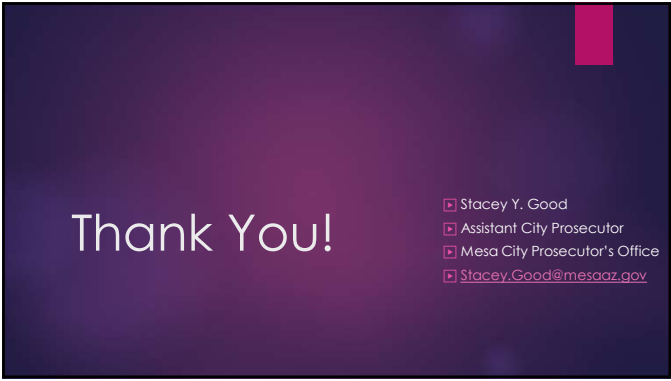
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